GEORGE BURY (DEFENDANT)... .....APPELLANT ; 1894

AND *May 16, 17.
*Oct. 9.

GEORGE MURRAY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Absolute transfer—Commencement of proof by writing—Oral evidence—Arts. 1233, 1234, *C.C.—Prête-nom—Compensation—Defence—Taking advantage of one's own wrong.*

Verbal evidence is inadmissible to contradict an absolute notarial transfer even where there is a commencement of proof by writing. Art. 1234 C.C.

A defendant cannot set up by way of compensation to a claim due to plaintiff a judgment (purchased subsequent to the date of the action) against one who is not a party to the cause, and for whom the plaintiff is alleged to be a *prête-nom.*

In an action to recover an amount received by the defendant for the plaintiff the defendant pleaded *inter alia* that the action was premature inasmuch as he had got the money irregularly from the treasurer of the province of Quebec on a report of distribution of the prothonotary before all the contestations to the report of collocation had been decided.

Held, affirming the judgment of the court below, that this defence was not open to the defendant, as it would be giving him the benefit of his own improper and illegal proceedings.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court, which condemned the appellant to pay the respondent Murray the sum of three thousand seven hundred and twelve dollars and ninety-two cents, with interest thereon from the thirtieth day of November eighteen hundred and eighty-eight, less the sum of one hundred and fifty dollars which Murray was condemned to pay Bury for damages.

*PRESENT :—Sir Henry Strong C.J. and Fournier, Taschereau, Sedgewick and King JJ.

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The circumstances which have given rise to the present litigation are briefly as follows:—

On the 14th August, 1883, the appellant, declaring himself to be the proprietor of seven undivided thirty-sixths of the island of Anticosti which was to be sold by public licitation, executed before Leclerc, notary public, a formal transfer and assignment to the respondent of two-sevenths of whatever the said seven thirty-sixths might realize after the deduction of law costs and the appellant's personal expenses, and a sum of five hundred and sixty-two dollars for which the respondent was indebted to him, with fifteen per cent interest computed on said deductions from the dates when the sums were originally advanced. The appellant acknowledged in the notarial assignment that the said transfer was made to respondent "for good and valuable consideration previously received by him," appellant.

The licitation sale took place on the 17th of June, 1884, and realized $101,000 and the appellant was collocated as proprietor of the seven thirty-sixths of the said island and withdrew the amount of the said collocation, but refused to pay over to respondent the two sevenths of said price as provided by said agreement and transfer.

Appellant was collocated for $2,886 as representing one thirty-sixth share, and $16,578 as representing six thirty-sixths, these shares having been acquired through different channels. Appellant's collocation to the six thirty-sixths was contested by one Mrs. Torre who had a claim against the property, but by the final judgment of the Supreme Court of Canada the appellant's rights to the amounts collocated to him for such six thirty-sixths were maintained, and he was thereby enabled to, and did, secure payment to himself of said amount.

The sum claimed by respondent in this action was two-sevenths of seven thirty-sixths of such price of sale after allowing certain deductions provided for in the deed of agreement between the parties.

The terms of this agreement were somewhat modified by a letter written by the appellant to respondent on the twelfth day of June, 1885, in which he says:—

MONTREAL, 12th June, 1885.

"GEORGE MURRAY, ESQ.,

DEAR SIR,—As soon as the present contestation shall have closed and I declared to be the owner of two-twelfths of the Island of Anticosti, I shall give you an order on Mr. Duberger, prothonotary of Murray Bay, for the portion of money coming to you according to the terms of a certain deed made by Leclerc, notary public, as between yourself and the undersigned,

Yours truly,

GEORGE BURY.

P. S.—It is also agreed that the whole amount for expenses will only be reckoned as five hundred dollars, although the sum expended was considerably in advance of that sum. The amount due for interest referred to in the deed of agreement shall be fixed at a sum of not more than two hundred dollars.

GEORGE BURY."

The appellant neglecting to comply with the agreement the respondent's attorneys made a formal demand upon him for such order, and then instituted legal proceedings against him.

The plaintiff was examined in order to establish a *commencement de preuve* that he was merely a *prête-nom* for one W. L. Forsyth, and other witnesses were also heard subject to objection to prove that the written transfer was not an absolute transfer, but only consented to as a method of security for some indebtedness

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due to respondent by said W. L. Forsyth. At the trial it was established that the judgment which one Cadieux a creditor of Forsyth's had against Forsyth was acquired by appellant two months after the date of respondent's action.

Barnard Q.C. and *Lafleur*, for appellant. The present appeal rests on two grounds, as practically the appeal to the Court of Queen's Bench did also. The first is that Mr. Forsyth was the real plaintiff in the case and that his claim was extinguished by compensation. The second that the action should, at all events, have been dismissed on the general issue, for want of proof.

It is submitted on the evidence that it is clear that the question in both its parts must be answered in the affirmative. If the courts below have reached a different conclusion it is owing to very serious and manifest misapprehensions both as to the law and the facts of the matter.

In the Queen's Bench the question was treated as if the sole issue were whether the respondent was a *prête nom* at the time of the transfer, while it is sufficient for us to show he was at the time of the action, when the debt due by Forsyth had been paid.

[The learned counsel then reviewed the evidence, contending that nothing was due to respondent and that he was a mere *prête-nom*, and cited Bedarride on Dol. & Fraude (1); Laurent (2).]

Then as to the plea of compensation we contend we had a right to acquire the judgments even *pendente lite*. Art. 1187, C. C.; *Frost* v. *Esson* (3); *Williams* v. *Rousseau* (4); *Roy* v. *McShane* (5); *Thibodeau* v. *Girouard* (6).

(1) Nos. 1271 & 1272.
(2) 18 vol. no. 420.
(3) 3 Rev. de Leg. 475.
(4) 12 Q. L. R. 116.
(5) 17 Rev. Leg. 667.
(6) 12 Legal News 186.

Finally we submit that under the agreement the respondent could not claim his share until the whole contestation of the dividend sheet was closed and settled effectually.

The contestation of the dividend sheet is not closed and settled as alleged, and the appellant has not received the whole $17,880.22\frac{1}{3}$, as also alleged, but $14,159.58\frac{1}{3}$ only, if even he can be said to have received that amount regularly.

Martin for respondent. Appellant admitted in his examination that by a final judgment of the Supreme Court rendered in June, 1888, his right to the amount collocated to him in the disputed item in the report of the distribution had been established, and by means of said judgment he had been enabled to secure and had secured the payment to himself of said amount.

No proof was adduced to destroy the effect of appellant's letter of the twelfth of June, 1885.

And clearly it does not lie in the mouth of appellant to attack a deed granted by himself for a consideration known to himself and judged sufficient, by suggesting frauds between himself, appellant and Forsyth, and of which he has not adduced one word of proof, and oral evidence cannot be given to vary an absolute deed of transfer. Art. 1234, C.C.

If plaintiff was not a *prête-nom* for Mr. W. L. Forsyth then the plea of compensation cannot be relied on, and, moreover, there is another reason which disposes of this plea; it is, as the courts below have held, that it rests on a judgment acquired since the action was taken.

THE CHIEF JUSTICE—The appellant alleges that the notarial deed of the 14th August, 1883, whereby he transferred to the respondent two-sevenths of the price

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of the Island of Anticosti, was not what on its face it purports to be, namely, an absolute transfer. It is asserted by the appellant that the respondent was originally a mere *prête-nom* for one William Langan Forsyth, or that the deed in question, if not made altogether for the behoof of Forsyth, was passed for the purpose, in the first place, of securing the payment to the respondent of certain moneys in which Forsyth then stood indebted to him and then to be for the benefit of Forsyth, and that these moneys having been long since paid the respondent now holds the share in the sale moneys transferred by the deed for the benefit of Forsyth absolutely; and further, that in either of the alternatives mentioned the appellant is entitled to compensate the respondent's demand, which it is alleged is really the demand of Forsyth, by a certain judgment recovered by one Cadieux against Forsyth, and by Cadieux transferred to the appellant.

I am of opinion that the appellant has entirely failed in proof of his allegations. It has been determined, first by Mr. Justice Davidson, and then by the Court of Appeals, that there was no sufficient commencement of proof in writing to be found in the deposition of the respondent to let in the testimony of witnesses. Whether this is so or not can, in the view which I take, make no difference, for even assuming that there was a perfectly good commencement of proof in writing verbal evidence would still be inadmissible. Article 1234 of the Civil Code says:

> Testimony cannot in any case be received to contradict or vary the terms of a valid written instrument.

The deed of transfer of the 14th August, 1883, being in terms an absolute transfer to the respondent, the attempt to alter it by the evidence of witnesses so as to make it conformable to the appellant's contention, namely, that it was a transfer to the respondent as a

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prête-nom for Forsyth, or as a mere security to the respondent for a debt since paid, and now held for the benefit of Forsyth, is of course an attempt to contradict or vary its terms by testimony in contravention of article 1234. Then is it permissible, notwithstanding this article 1234, to receive verbal testimony to alter or contradict a deed or other writing on the ground that there is a commencement of proof in writing? By article 1233 seven cases are enumerated in which testimonial proof is admissible; one of them is the case where there is a commencement of proof by writing. Then as article 1234 says that oral proof shall not in any case be received it must be interpreted as excluding all the cases mentioned in the next preceding article. It is not to the purpose to show that the French authorities are against this, for the French code makes different provisions for such a case. Art. 1341 of that code which says that oral proof shall not be received against *actes* is followed by article 1347, which introduces an express exception in favour of the admission of such proof when there exists a commencement of proof by writing. This question is ably treated in a work on the law of evidence in the province of Quebec (1) lately published; and in the absence of judicial decisions to the contrary I adopt the learned author's conclusions, inasmuch as they appear to be founded on unanswerable arguments.

Had there been a full admission by the respondent that there was such a collateral agreement as the appellant alleges such admission would, no doubt, be sufficient to support his case, but I am unable to find such an admission though I have read the respondent's deposition several times. This evidence is not clear; in some respects it is quite incoherent; but the effect

(1) Langelier de la Preuve, arts. 584-640.

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of what the respondent says, so far as I can gather it, is that the deed was intended to be what in its terms it purports to be, and that he (the respondent) considered himself under some honorary, but not under any legal, obligation to give something to Forsyth out of any surplus. This is, of course, insufficient. The deed according to the respondent's account, and according to the evidence of Forsyth, appears to have been made at the instance of Forsyth and under pressure by the appellant for the payment of the $562 note, and Forsyth swears very positively that the respondent was not in any way a *prête-nom* for him (Forsyth) and that he was not to have any legal benefit from the transfer. I think, therefore, the case entirely fails upon the evidence. Further, I am at a loss to see how, even if that which the appellant desired to prove was established, it would be possible to have the benefit of a compensation of the judgment transferred by Cadieux when Forsyth is not a party in cause. Then, as to the other objection that the action is premature for the reason that the contestation of the collocation had not been decided, as it appears by the prothonotary's certificate dated 6th November, 1889, that it had not been, I think that defence also fails. The appellant, by means of certain representations made by him to the treasurer of the province of Quebec, obtained the amount which he was set down as entitled to receive in the prothonotary's report of collocation; this fact is admitted by the appellant in his deposition when called as a witness by the respondent. In the face of this admission that he has actually got the money into his own hands it does not lie in the mouth of the appellant to say he got it irregularly, that by untrue representations he procured it to be paid to him when he was not entitled to receive it. I think the rule that no one can take advantage of his own wrong applies, and if

we were to admit the sufficiency of this reason of appeal we should be doing nothing less than giving the appellant the benefit of his own improper and illegal proceeding by means of which he induced the provincial treasurer to pay this money to him when, as he well knew, he had no right to receive it.

I do not make the figures given in the judgment of the Superior Court tally with the amount admitted to have been received by the appellant, but I do not remember that any point was made of this at the hearing of the appeal, nor do I find it referred to in the appellant's factum. If it appears in drawing up the judgment that there has been any mistake in this respect it may be rectified, but that will not of course affect the costs for the appeal must in any event be dismissed with costs subject to the alteration mentioned if any should be required to be made.

FOURNIER J.—I concur.

TASCHEREAU J.—For the reasons given by the Superior Court, in its formal judgment, I am of opinion that this appeal should be dismissed with costs.

I express no opinion, one way or the other, on the point determined by the majority of the court as to the admissibility of verbal evidence under arts. 1233, 1234, 1235 of the code where there is a *commencement de preuve par écrit.* The solution of this question is not necessary to determine the case and it was not argued before us nor determined by the courts below.

SEDGEWICK and KING JJ. concurred with the Chief Justice.

Appeal dismissed with costs.

Solicitors for appellant: *Barnard & Barnard.*

Solicitor for respondent: *George G. Foster.*